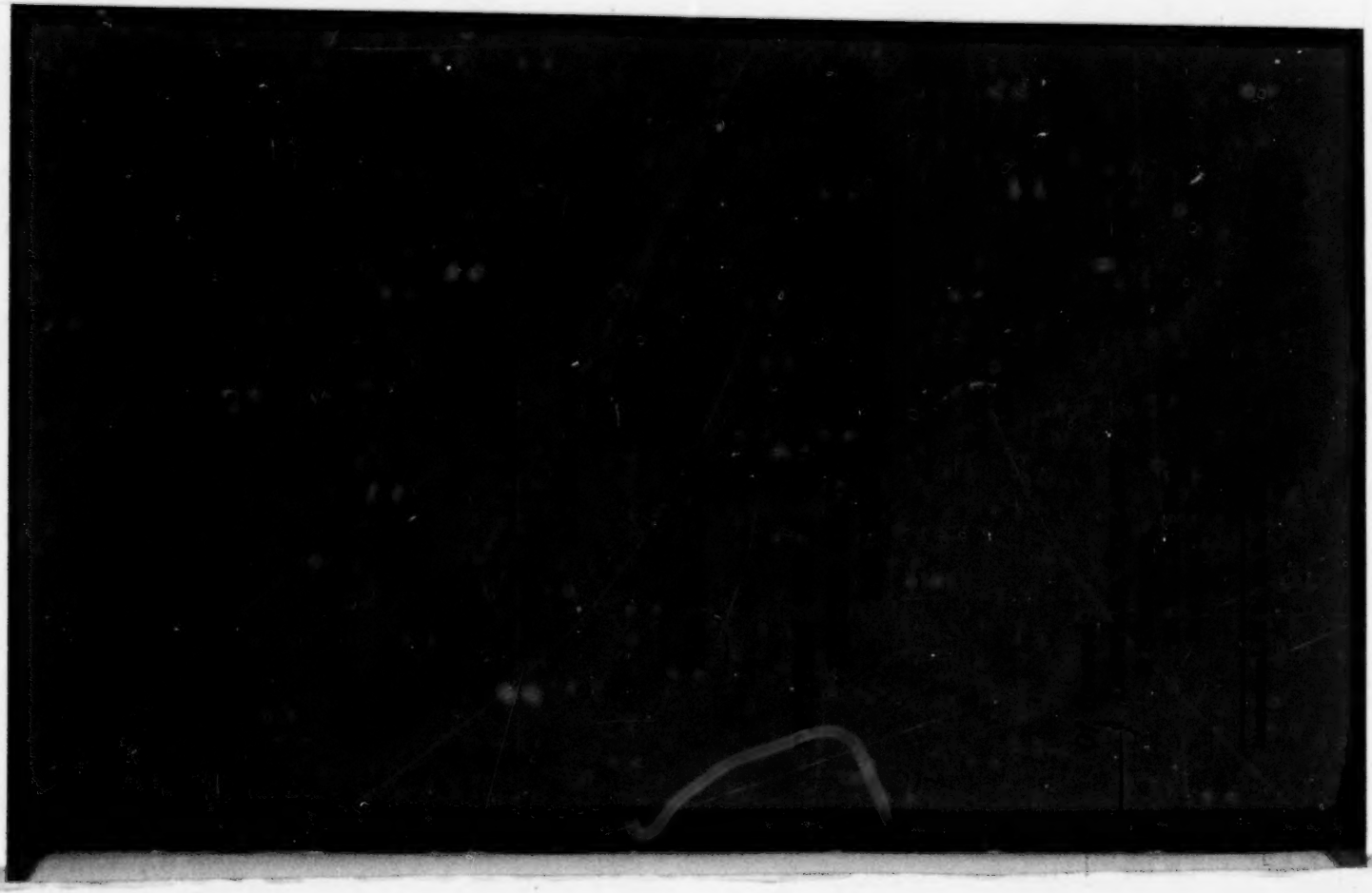

TABLE OF CONTENTS.

CITATIONS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. .

ANDIMO PAPPADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Andimo Pappadio, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 24, 1965.

OPINIONS BELOW.

The opinions and dissenting opinion in the courts below (Appendix A(1) and (2), *infra,* pp. 23-35) are reported at 235 F. Supp. 887 and 346 F. 2d 5.

JURISDICTION.

The judgment of the court below (Appendix B, *infra,* pp. 36-37) was entered on May 24, 1964. A timely petition for rehearing and for rehearing en banc was denied on June 21, 1965 (Appendix C, *infra,* pp. 38-39). On July 6, 1965, Mr. Justice Harlan granted an extension of time, to and including August 19, 1965, for filing a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner should have been granted a trial by jury on a charge of criminal contempt of court where he has been sentenced to two years' imprisonment.

2. Whether the District Court could legally sentence petitioner to two years' imprisonment for contempt of court following a non-jury hearing under Rule 42(b) of the Federal Rules of Criminal Procedure.

3. Whether, assuming *arguendo* that a sentence of two years may be imposed for criminal contempt without a trial by jury, there was an abuse of discretion in sentencing petitioner to two years' imprisonment for refusing to answer five questions where he had answered more than one hundred questions.

4. Whether a grand jury witness, under indictment charging violation of the narcotics laws, may be held in contempt of court for refusing to testify, after he had been granted immunity under 18 U. S. C. § 1406, before a federal grand jury investigating violations of the narcotics laws.

5. Whether a grand jury witness, having unconditionally testified to non-involvement with a group allegedly engaged in illegal narcotics activity, having thus contradicted under oath evidence said to be in the hands of the Government, thereby becoming subject to the peril of a perjury prosecution, has a privilege under the Fifth Amendment to refuse to answer questions about his relationship with the alleged leader of that group.

6. Whether a grand jury witness, who is already under indictment charging violation of the narcotics laws, and who is further subject to perjury prosecution by virtue of

testimony given before the grand jury, may refuse to answer questions concerning his conferences with attorneys, notwithstanding that he had been granted immunity under 18 U. S. C. § 1406, on the ground of the First Amendment right to silence and freedom of association and the Sixth Amendment guarantee of effective assistance of counsel.

7. Whether the immunity statute, 18 U. S. C. § 1406, was unconstitutional as applied to the petitioner since it was not, as to him, a replacement of his Fifth Amendment rights.

8. Whether a grand jury witness, who, after a grant of immunity under 18 U. S. C. § 1406, has answered every question asked of him relating to narcotics, may properly be convicted of contempt of court for refusing to answer other questions not shown to be relevant or pertinent to the subject under inquiry before the grand jury, nor to the provisions of the statute under which immunity was conferred.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED.

Constitution of the United States:

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U. S. C. 1406 provides:

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c. 629, Title II, § 201, 70 Stat. 574.

Federal Rule of Criminal Procedure involved:

Rule 42 of F. R. Crim. P. provides:

* * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT.

This is a criminal contempt case, arising out of the refusal of petitioner to answer some of the questions put to him before a federal grand jury investigating possible narcotics offenses.

At the time of his appearances before the grand jury, petitioner was under federal indictment in that same district for violation of the narcotics laws (61a).[1] Flatly contradicting information allegedly in the hands of the Government (59a-60a, 173a-174a), petitioner unequivocally denied any involvement as an individual or as a member of a group in unlawful narcotics activities (174a-175a, 214a).

The case arises from a grand jury investigation in the United States District Court for the Southern District of New York. The grand jury was impaneled in September 1963, and subsequently began an investigation into possible violation of the Federal Narcotics Laws, referred to in 18 U. S. C. § 1406. On his first three appearances before the grand jury, petitioner refused to testify on the ground of self-incrimination. There was then pending in the Southern District of New York an indictment against petitioner, returned in 1958, charging him with conspiracy to violate the narcotics laws (11a).

The Government, without moving to dismiss the indictment, which is still pending, undertook to have petitioner granted immunity, pursuant to § 1406, for any transaction or matter about which he was compelled to testify. Statutory immunity was granted (116a).

Thereafter, petitioner again appeared before the grand jury and testified. In the course of interrogation, the prosecutor put a carefully prepared question:

---

1. References to figures with the suffix "a" are to the printed appendix filed in the court below. Nine copies of the appendix have been lodged with the Clerk of this Court.

"So that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a Senate committee and statements have been made to Federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It has been alleged that one of these alleged illegal activities is the illicit narcotics traffic. It's also been alleged, sir, that you are a member of this particular group——

"Now, what we're attempting to do is to find out whether or not these allegations are true or false. Are these allegations true?" (174a-175a)

Petitioner responded:

"I am not a member of this group if they exist I have no knowledge if there is a group. I do not deal in narcotics. I do not know if Mr. Lucchese deals in narcotics and I do not know if anybody else in this room or out of this room is dealing with narcotics." (175a)

The Government also asked petitioner before the grand jury the following questions:

"Q. Mr. Pappadio, I'm now going to ask you some of the questions that Judge Herlands directed you to answer the time you were before him prior to today. The first one is this Mr. Pappadio—At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting?" [Petitioner answered, "No, sir."]

"Q. Do you know of such a meeting?" [He answered, "No, sir."] "Q. "Do you know Rocco Mazzie?" [Petitioner answered, "No, sir."] (214a)

Petitioner thus flatly denied, under oath, subject to the pains of a perjury prosecution, statements which he had been told were given to the Government. Petitioner denied, unconditionally, any knowledge about or complicity in illegal narcotics activities, the sole subject under investigation by the grand jury.

Petitioner answered other questions put to him, until the prosecutor began to inquire about conferences between petitioner and attorneys (178a). When petitioner declined to answer, the machinery was set in motion for a contempt proceeding.

After some further questioning had elicited the fact that petitioner knew Thomas Lucchese, and had previous contact with him, the prosecutor began to inquire about conferences where Lucchese, petitioner, attorneys and other persons had been present (178a). Petitioner refused to answer, relying at first on the attorney-client privilege (178a-183a). Later, having consulted with counsel, he expanded his objection to the First, Fifth, and Sixth Amendments (183a-189a). The district court directed petitioner to answer the questions (203a-209a). After the district judge had withdrawn, petitioner again declined to testify about his meetings with counsel [2] (210a-212a).

On the following day, the Government moved for an order that petitioner show cause why he should not be held in contempt (4a-6a). The order was issued (3a), and

---

2. Five questions were unanswered; they were:

(1) "Mr. Pappadio, who were the attorneys who were present at these meetings?" (210a);

(2) "Aside from the meetings which you described, which took place on the street, where else did you meet with Lucchese?" (210a);

(3) "Who else was present at these meetings besides yourself, Lucchese and the attorneys?" (210a);

(4) "All right; how many of such meetings were there?" (211a);

(5) "Where did the meetings take place?" (212a).

It is relevant to note that, with respect to the fourth question, petitioner did answer at an earlier stage (178a).

the matter came on for hearing before William B. Herlands, D. J. Petitioner's sworn answer (7a-10a) recited the pending indictment outstanding against him and, further, the assertion by counsel for the Government that they had received information that petitioner was a member of a group engaged in illegal narcotics traffic. The answer pointed to petitioner's unequivocal denial of these charges before the grand jury and averred that petitioner has been and is in consultation with attorneys and prospective witnesses with respect to the indictment:

> "To answer the questions put to him before the Grand Jury would result in the disclosure to the Government of matters of defense, as well as matters within his privilege of confidence between client and attorney. To answer such questions would result in interference with and impairment of his right to defend himself and the effective assistance of counsel." (9a)

The answer also indicated that petitioner had consulted with attorneys on the possible perjury proceedings that might be brought as a result of his testimony.

The answer further stated that petitioner was aware and believed that he has been the subject of surveillance, including electronic eavesdropping, by Federal and local officials. Additional surveillance with respect to his attorneys and witnesses would substantially impair and prejudice his ability to defend himself (9a).

In addition to matters of privilege, the answer asserted that the questions he had declined to answer were not pertinent to the subject under inquiry by the grand jury. The subject had not only been announced to petitioner, but it had been the basis upon which the order granting immunity under § 1406 had been obtained.

A hearing was had before the district court on October 28, 1964. At the outset a motion for a jury trial was made and denied (34a). The Government stipulated that

an indictment is now pending in the United States District Court for the Southern District of New York against the defendant for violation of the narcotics laws (61a). The Government further stipulated that it has statements to the effect that the petitioner was involved as a member of a group engaged in illegal activities and that there was testimony in a case that the defendant was involved in narcotics (59a-60a).

The assistant United States Attorney told the district court that the outstanding indictment against petitioner was not on the trial calendar, since with respect to the other defendants who did stand trial the case was still in the appellate courts (62a). The petitioner had been severed from that trial (60a). The Government stated that "the case is not presently on the trial calendar" (61a).

At the hearing counsel for the petitioner argued that since the petitioner had answered many questions and only refused to answer five questions that fact was relevant to the issue of willfulness (54a); that the questions asked of the petitioner were not material and relevant (55a); that he was facing a prosecution for perjury (56a-57a) for which he has no immunity.

The petitioner placed into evidence the outstanding indictment against him (11a-20a, 60a), as well as the transcript of the testimony of the trial where there was testimony by a witness for the Government stating that he was present at the meeting (21a-32a, 59a-60a).

Counsel for petitioner further argued that requiring petitioner to answer these questions involving or relating to meetings with attorneys and the persons present at these meetings violates his rights under the First and Sixth Amendments.

Counsel for petitioner had argued that the Government had no right to call petitioner as a witness before the Grand Jury since he was under indictment (139a-142a). The district court ruled that this argument was without merit (142a-144a).

The district court took the matter under advisement and adjourned the hearing until October 30, 1964. On that date, the petitioner was adjudged guilty of criminal contempt of court and sentenced to a term of imprisonment of two years. The sentence further provided that if the petitioner answer the questions as directed prior to expiration of the sentence or discharge of the grand jury, whichever first occurs, further application may be made to the court to reconsider the sentence (76a, 78a). This grand jury was discharged in March of 1965.

The court below said (Appendix A(1), *infra*, pp. 26-27):

> "The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958 appears not to be great; . . . we are informed that Pappadio's name has not even appeared on the trial calendar since 1958. . . ."

> "In any event, Pappadio suggests no way in which the dependency of the 1958 indictment renders the immunity granted under § 1406 insufficient to protect him from being incriminated by his answers. Pappadio does point out, correctly, that the immunity does not bar the government from prosecuting him under the indictment or for perjury in the testimony he may give before the grand jury. The danger of such prosecutions is something different than the danger of self-incrimination, however, and the protection of § 1406—like that of the constitutional privilege which it replaces—is directed only at the latter."

The court below further said:

> "The legitimate interests of a witness before a grand jury, even a witness under indictment, would seem to be sufficiently protected by the privilege against self-incrimination." (Appendix A(1), *infra*, pp. 27-28)

The court below held that the attorney-client privilege and the Sixth Amendment were here not sufficient to justify a refusal to answer these five questions even though petitioner alleged that the meetings were with counsel and witnesses in connection with the 1958 indictment and a possible prosecution for perjury. The court below dismissed petitioner's contention that the questions were not relevant to the grand jury's inquiry.

The court below did not adopt petitioner's contentions that the First Amendment was a further bar to these particular questions and that the immunity statute as applied in this case was no replacement of the Fifth Amendment.

The majority of the court below sustained the sentence of two years for criminal contempt stating that the "*Barnett* dictum" does not apply where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. Judge Medina agreed with the majority on all points except that the sentence to a period of two years' imprisonment was in his opinion "too much." (Appendix A(1), *infra*, p. 29)

REASONS FOR GRANTING THE WRIT.

1. This case is closely parallel to *Harris v. United States*, No. 6, October Term, 1965, in which this Court granted certiorari on December 14, 1964. There are, however, differences between the two cases, and together they permit a fuller examination by the Court of the contempt power than would either case alone. Both present the important questions whether trial by jury is guaranteed to persons charged with criminal contempt and whether a sentence in excess of that permitted for petty offenses can be imposed, where a jury trial has been denied. The *Harris* case arises in the context of a summary proceeding under Rule 42(a) of the Federal Rules of Criminal Procedure. In this case, Rule 42(b) was invoked. The difference in procedure is reflective of the fact that Harris's refusal to answer occurred in the presence of the district judge, whereas the court was absent during the interrogation of the petitioner in this case. The two thus provide companion situations of fact, complementing and supplementing each other.

This Court will certainly not wish to dispose of the present case in advance of decision in *Harris v. United States, supra.* Even if none of the additional facets of this case, nor the separate questions presented here and not in *Harris,* are deemed worthy of plenary review by this Court, the final resolution of this case is interlocked with and dependent upon the ruling in *Harris.*

We further submit that there was an abuse of power in sentencing petitioner to two years' imprisonment since this petitioner had answered literally scores of questions (170a-184a). If witnesses called before the Grand Jury are to receive the same severe maximum sentences whether they refuse to answer any questions, as is quite frequent, or whether they have cooperated 99%, witnesses in the future may be reluctant to cooperate where no consideration is given for answering practically every question asked.

As this Court stated in *Green v. United States*, 356 U. S. 165, 188 (1958),

> "[I]n the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection. The 'discretion' to punish vested in the District Courts . . . is not an unbridled discretion. Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed."

2. Important new questions of the constitutionality of compelled testimony, under the guise of an immunity statute, are presented in this case. The validity of the Narcotic Control Act of 1956, 18 U. S. C. § 1406, has been before this Court in two prior proceedings: *Reina v. United States*, 364 U. S. 507 (1960); *Piemonte v. United States*, 367 U. S. 556 (1961). While in both instances the Court upheld the statute, in neither case was the petitioner under a pending indictment at the time the Government sought to force him to testify. Two Justices of this Court dissented in *Piemonte* because the witness was indicted *after* he had been sentenced for contempt, and even though the indictment had been dismissed before review in this Court. Petitioner in this case presents the basic question whether the immunity granted by § 1406 deprives him of his right not to take the stand in a criminal proceeding.

The court below tried to circumvent the fact that the witness before the grand jury was also a defendant in a pending criminal case. Prognosticating, the court below tried to ignore the indictment as somewhat stale:

> "The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958, appears

> not to be great; seventeen of the thirty-seven defendants named in the indictment were tried and convicted in 1959, see *United States v. Aviles,* 274 F. 2d 179 (2 Cir.), cert. denied, 362 U. S. 974 (1960), but we are informed that Pappadio's name has not even appeared on the trial calendar since 1958." (Appendix A(1), p. 26, *infra.*)

Nice calculations about the probability and possibility of prosecution do not make the indictment disappear. The Government was actively prosecuting other defendants under it. See *United States v. Aviles,* 337 F. 2d 552, cert. denied, 380 U. S. 906 (March 1, 1965). The Government had not and has not moved to dismiss the indictment against petitioner, who had and has grounds to believe that he may be tried.[3]

Verbal cosmetics will not disguise the fact that the Government here sought to compel a defendant, facing a live indictment, to testify in a criminal proceeding. Whether this is in accord with the Constitution of the United States, or whether it ought to be tolerated by this Court under its supervisory power over the administration of justice in the federal courts, presents a question which has not been and which ought to be decided by this Court.

3. This case presents the significant question whether a grant of immunity under statutes like 18 U. S. C. § 1406 displaces constitutional rights and privileges other than the privilege against self-incrimination. Petitioner here refused to answer certain questions that related to his defense of a pending criminal indictment. To compel him to answer would be, in effect, to compel him to take the stand in a criminal case, contrary to the Fifth Amendment. The

3. The court below was informed, in the oral argument November 18, 1964, by the Government, that one of the reasons why Pappadio's name had not appeared on the trial calendar was because the second *United States v. Aviles* case, *supra,* had not yet been finally terminated (Petitioner's Pet. for Rehearing p. 4).

questions were directed at petitioner's conferences with attorneys, an area protected by the Sixth Amendment guarantee of right to counsel. Petitioner further urged his First Amendment privilege of silence and freedom of association.

These are not inconsequential claims of constitutional privilege. While this Court held in *Reina v. United States, supra,* that the immunity under § 1406 was broad enough to encompass the privilege against self-incrimination, the right of a defendant not to testify is a broader right than the self-incrimination privilege.[4] Mr. Justice Douglas explicitly pointed to that larger scope of protection in *Piemonte v. United States, supra,* at 566:

> "His right not to take the stand in a federal criminal trial transcends his privilege against self-incrimination. No immunity statute, no pressure of government, no threats of the prosecution can be used to deprive the citizen of this right."

Petitioner's effort to screen off from the Government his relationship with counsel certainly raises significant issues. The Government and the court below only address themselves to the common-law attorney-client privilege, but petitioner's claim is deeper than that. Although he initially objected to the inquiries on that ground, after consultation with his lawyer, petitioner rested his refusal to answer upon the broader ground of the Sixth Amendment right to effective assistance of counsel. Petitioner's view that this right was in jeopardy is not unreasonable or imaginary. Were the Government to find out, for example, who was present at such conferences, they might seek to induce or compel such persons to disclose the substance of the discussions. If the persons present were potential de-

4. Even under the privilege against self-incrimination, petitioner has a stronger position than Reina. The immunity statute does not bar prosecution, but merely bars use of the compelled testimony. Since petitioner was already under indictment, his need for protection was correspondingly greater.

fense witnesses to the charges in the indictment, the Government would have effectuated pre-trial discovery, in a criminal case, unauthorized if sought directly.

Petitioner's real concern about disclosure of the time and place of his meetings with attorneys derives from the not fanciful fear that the Government was utilizing clandestine surveillance and electronic eavesdropping devices. The reality of this fear was only recently reinforced by the concession of the Internal Revenue Service that it conducts schools to train its agents for what many hold to be scandalous activities. See, e.g., *New York Times,* July 15, 1965, p. 17.

The court below, in a strange non-sequitur, noted that the meetings as to which petitioner was questioned took place in 1963 or later, "over six years after the most recent act alleged in the 1958 indictment" (Appendix A(1), *infra,* at p. 26). It is, of course, not unnatural that the commencement of the grand jury investigation in 1963 on possible narcotics offenses would precipitate more urgent concern on the part of an indicted defendant as to the direction and course of his defense to the outstanding charges and the possible impact of the grand jury proceedings upon those charges.

That the duty to testify is not coextensive with the possible range of government inquiry, is a recognition of values which override government interests in obtaining information. ". . . Immunity acts are useful only to compel testimony protected by the fifth Amendment; a grant of immunity cannot be used to compel the testimony of a witness who bases his refusal to testify either on another evidentiary privilege or on his first Amendment right to silence." Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope,* 72 YALE L. J. 1568, 1578 (1963). (Footnote omitted.)

The truth of these propositions is meaningfully challenged by the prosecution in this case. Such challenge justifies invocation of this Court's power to grant the writ of certiorari.

4. Petitioner's concern that he not be maneuvered into a perjury prosecution, through the application of an immunity statute, presents a question important to the administration of criminal law. As do other immunity acts, § 1406 specifically provides that a witness is not exempt from prosecution for perjury while giving testimony under the compulsion of the statute. With the prospect of an indictment for perjury in the background, under the circumstances of this case a correlative privilege against self-incrimination must also arise.

To illustrate in this case, petitioner had testified under compulsion that he was not involved in illegal narcotic activities alone or as a member of a group headed by Thomas Lucchese. The Government indicated on the record that it had evidence to the contrary. Out of this conflict, a charge of perjury was not fanciful. The Government pressed, nonetheless, for petitioner to give testimony about meetings he had attended with Lucchese. Even though such meetings may have been entirely innocent, others might interpret the circumstances differently. "[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Board of Education,* 350 U. S. 551, 557-558 (1956); see *Grunewald v. United States,* 353 U. S. 391, 421 (1957). Petitioner might reasonably fear that further testimony about conferences with Lucchese would ensnare him in perjury prosecution, which, though unfounded, was nonetheless real.

The immunity statute, § 1406, in no way prevents a witness from being whipsawed into such an unfavorable position. The witness who truthfully testifies in contradiction to information in the possession of the Government has the primary reason for concern. The scope of protection afforded to such a witness by the due process clause of the Fifth Amendment as well as the self-incrimination clause is an important question that this Court ought to decide.

5. Finally, this case poses the significant question of the limitations of pertinence to the subject matter that circumscribe interrogation of a witness compelled to testify under grant of statutory immunity. The issue has dimensions of constitutional law as well as statutory interpretation.

In dealing with investigating committees of the Congress, this Court has laid down elementary rules of pertinency for the protection of witnesses. *Deutch v. United States,* 367 U. S. 456 (1961); *Watkins v. United States,* 354 U. S. 178 (1957). As the opinions of the Court have declared, the requirements are derived in part from the Due Process Clause of the Fifth Amendment. *Watkins* and *Deutch* both held that:

> "Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto."
>
> 354 U. S. at 214-215; 367 U. S. at 468.

This constitutional requirement of legislative committees is surely applicable with equal or greater force to a grand jury investigation.

In the court below, the Government argued that *Watkins* is inapposite because "the legislative powers of congressional committees are limited by considerations of legislative purpose. The scope of a grand jury inquiry is not similarly restricted." Brief for the United States, p. 15. The contention that legislative investigations are inherently more limited in scope than grand jury inquiries is without foundation. Both have broad ranging powers, and it is the breadth that underlies the requirement, applicable to both, that they proceed in a regularized manner in extracting information from unwilling witnesses.

The proceedings in this case do not meet the constitutional requirements of *Watkins* and *Deutch.* The Govern-

ment concedes as much in its spurious attempt to distinguish the legislative investigation cases. It remains for this Court to hold expressly that the requirements of both types of investigation rest on the same constitutional footing.

The statutory aspect to the requirement of pertinency derives from the limited scope of the immunity act, § 1406. Congress has not seen fit to enact a general immunity statute. Rather it has passed a long series of specific acts, confined to particular areas. Over forty acts can now be found in the United States Code. See Comment, 72 Yale L. J. 1568, 1611-1612 (1963). Where one of these statutes is invoked, it would be a perversion of the legislative pattern not to confine the inquiry to the area contemplated by the Congress in authorizing immunity. Petitioner's objection to the pertinency of the questions put to him was not met. He is entitled to refuse to answer questions that are not pertinent, under the Constitution and under § 1406. There is thus presented a fundamental question which this Court most appropriately should consider.

CONCLUSION.

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for Petitioner.

Of Counsel:
LAURITANO, SCHLACTER & SCHNEIDER,
205 West 34th Street,
New York, N. Y.

August, 1965.

APPENDIX A(1).

OPINIONS BELOW.

Opinion of the United States Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 248—September Term, 1964.

(Argued November 18, 1964 Decided May 24, 1965.)

Docket No. 29298

UNITED STATES OF AMERICA,
Appellee,

v.

ANDIMO PAPPADIO,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

MEDINA and MARSHALL, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, William B. Herlands, *J.*, which adjudged the appellant guilty of contempt for his refusal to answer questions before a federal grand jury.

Affirmed.

JOHN E. SPRIZZO, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and John S. Martin, Jr., Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

MAURICE EDELBAUM, New York, N. Y. (Philip R. Edelbaum and Lauritano, Schlacter & Schneider, New York, N. Y., and Jacob Kossman, Philadelphia, Pa., on the brief), *for defendant-appellant.*

LUMBARD, *Chief Judge:*

Andimo Pappadio appeals from a conviction for contempt for refusing to answer five of the questions put to him by a federal grand jury sitting in the Southern District of New York. We find the conviction and sentence to be proper, and we affirm the judgment of the district court.

As part of the grand jury's inquiry into alleged violations of the federal narcotics laws, it had Pappadio summoned before it. On February 14, 1964 and again on April 24 and May 8, he was asked numerous questions, but he gave only his name and some other biographical information; he refused to answer the other questions on the ground that his answers would tend to incriminate him.

On the government's application, Judge MacMahon on August 4, 1964 issued an order under 18 U. S. C. § 1406,[1]

1. "§ 1406. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

which directed Pappadio to testify and granted him immunity from prosecution with respect to such testimony. However, Pappadio again refused to testify when he appeared before the grand jury later that day and on October 6. (At these and earlier appearances he sometimes cited the First Amendment as well as the Fifth.)

On October 8, Judge Herlands specifically ordered Pappadio to answer the grand jury's questions, and Pappadio did answer some questions the following day. But he refused to give any information concerning his meetings with Tommy Lucchese and, it appears, one or more lawyers. He based his refusal principally on the attorney-client privilege but also on the First, Fifth and Sixth Amendments.

After a hearing before Judge Herlands, who found his claim of privilege to be without merit, Pappadio answered questions as to the duration and time of day of the meetings. However, he still refused to answer five of the questions, and these are the questions at issue on this appeal:

> "Mr. Pappadio, who are the attorneys who were present at these meetings?"

---

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?"

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?"

"All right. How many of such meetings were there?"

"Where did the meetings take place?"

A hearing pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure was held on October 28 and 30. Judge Herlands found Pappadio guilty of contempt and sentenced him to imprisonment for two years or "until further order of the Court" if Pappadio answered the questions before his sentence expired or the grand jury was discharged, whichever first occurred.

Pappadio's principal challenge to his conviction is that he was privileged not to answer the questions, despite the grant of immunity under § 1406. Three grounds are put forward for the claimed privilege. The first is that he is under indictment for alleged violation of the federal narcotics laws. The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958, appears not to be great; seventeen of the thirty-seven defendants named in the indictment were tried and convicted in 1959, see *United States v. Aviles*, 274 F. 2d 179 (2 Cir.), cert. denied, 362 U. S. 974 (1960), but we are informed that Pappadio's name has not even appeared on the trial calendar since 1958. Moreover, the meetings as to which Pappadio was questioned took place in 1963 or later,[2] over six years after the most recent act alleged in the 1958 indictment.

In any event, Pappadio suggests no way in which the pendency of the 1958 indictment renders the immunity granted under § 1406 insufficient to protect him from being

2. Pappadio was questioned as to meetings which occurred subsequent to commencement of proceedings before the grand jury, which was impaneled in September 1963.

incriminated by his answers. Pappadio does point out, correctly, that the immunity does not bar the government from prosecuting him under the indictment or for perjury in the testimony he may give before the grand jury. The danger of such prosecutions is something different than the danger of self-incrimination, however, and the protection of § 1406—like that of the constitutional privilege which it replaces—is directed only at the latter. Section 1406 does effectively protect the witness from being prejudiced in any criminal proceeding as a result of his answers; it creates a defense to prosecution for acts as to which he is compelled to testify, and it bars the use of such testimony against him in a prosecution for any other acts.[3]

If Pappadio is required to give any testimony relating to the matters charged in the 1958 indictment, in response either to the questions now at issue or to subsequent questions, he could then move to have the indictment dismissed as to himself. And even if his answers are not such as to entitle him to dismissal of the indictment, he is protected against the answers being used against him in any criminal proceeding, including one under the pending indictment.

It appears to be Pappadio's position, however, that protection against self-incrimination is insufficient in this case because the privilege not to testify before a grand jury while under indictment is part of the privilege of a criminal defendant not to testify at trial, a privilege which goes beyond the privilege against self-incrimination. See *Piemonte v. United States*, 367 U. S. 556, 565 (1961) (Douglas, *J.*, dissenting). The legitimate interests of a witness before a grand jury, even a witness under indictment, would seem

3. By its express terms, § 1406 does not protect a witness from prosecution for perjury committed while testifying under that section's compulsion. Such a limitation has been held not to make a statutory grant of immunity an inadequate substitute for the Fifth Amendment privilege. *Glickstein v. United States*, 222 U. S. 139 (1911). The theory of *Glickstein* is that the Fifth Amendment protects only against self-incrimination with respect to past acts, not with respect to the testimony being given.

to be sufficiently protected by the privilege against self-incrimination. And, apart from the *Piemonte* dissent, we find no authority for also extending to such a witness the privilege not to testify at all, even where given immunity.

The second and third grounds offered for the claim of privilege are that the requested facts are protected by the attorney-client privilege and that the questions interfere with the right to effective representation by counsel guaranteed by the Sixth Amendment. The factual premise for both grounds is Pappadio's allegation that the meetings were with counsel and witnesses in connection with the 1958 indictment and a possible prosecution for perjury.

Since the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution. See Note, 72 Yale L. J. 1568, 1578 (1963). Pappadio's reliance on the privilege in this case is misplaced, however. On the present record we cannot determine whether the privilege could properly be asserted even with respect to the subject matter of the meetings. In any event, the grand jury has not inquired into the subject matter of the meetings, and the questions which it has asked—who was present; where did the meetings take place; who arranged them—have not touched on matters meriting the protection of the privilege. See *Colton v. United States,* 306 F. 2d 633 (2 Cir. 1962), cert. denied, 371 U. S. 951 (1963). For the same reason, the questions have in no way interfered with Pappadio's right to effective representation by counsel. Compare *Coplon v. United States,* 191 F. 2d 749 (D. C. Cir. 1951), cert. denied, 342 U. S. 926 (1952).

Pappadio also objects to his sentence. He contends that the penalty imposed for criminal contempt after only a summary trial is constitutionally limited to that provided for petty offenses. See *United States v. Barnett,* 376 U. S. 681, 695 n. 12 (1964). Read literally, the *Barnett* dictum does indeed stand for such a rule, and it appears to have

been so interpreted by a majority of a panel of the Court of Appeals for the District of Columbia. See *Rollerson v. United States,* No. 17675, October 1, 1964 (2-1 decision). However, we adhere to our prior decisions, which have interpreted the *Barnett* dictum as not applying where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. See *United States v. Shillitani,* No. 29117, May 18, 1965; *United States v. Tramunti,* No. 29387, April 5, 1965; *United States v. Castaldi,* 338 F. 2d 883, 885, petition for cert. filed, 33 U. S. L. Week 3223 (Dec. 17, 1964); *United States v. Harris,* 334 F. 2d 460, 463, cert. granted, 379 U. S. 944 (1964).

We have considered Pappadio's contention that the questions were not shown to be relevant to the grand jury's inquiry, and we find it to be without merit.

The judgment of the district court is affirmed.

MEDINA, *Circuit Judge* (concurring and in part dissenting):

I agree with my brothers of the majority on all points except the sentence to a period of two years imprisonment. This, in my opinion, is too much. We have held that this Court has power to reduce the period of imprisonment meted out for a contempt of court, see *United States v. Levine,* 1961, 288 F. 2d 272, applying the unambiguous mandate of *Brown v. United States,* 1959, 359 U. S. 41, 52, and I would reduce appellant's sentence to one year instead of two. I realize that this Court has upheld sentences of two years in similar cases, but I wish to register my dissent.

Opinion in District Court.

HERLANDS, *District Judge.*

The Court having considered the evidence and the documents finds as follows:

1. Notice of this hearing was given by an order to show cause signed by me on October 14, 1964, and served on Andimo Pappadio, the witness, and his counsel.

2. A grand jury was duly impaneled for this District in September 1963, and subsequently began an investigation into possible violations of the Federal Narcotic laws, which are referred to in Title 18, United States Code, Section 1406. The grand jury was engaged in this investigation on February 14, 1964, April 24, 1964, and May 8, 1964.

3. Andimo Pappadio, the witness, was duly subpoenaed to appear and testify before this grand jury by a valid subpoena dated February 3, 1964.

4. Pursuant to said subpoena, Andimo Pappadio, the witness, did appear and testify before the grand jury on February 14, April 24, and May 8, 1964.

5. On August 4, 1964, in the presence of Pappadio and the grand jury, oral and written application was made by the United States Attorney pursuant to the provisions of Title 18, United States Code, Section 1406, to have the aforesaid Pappadio instructed to testify.

The written application consisted of an affidavit of the United States Attorney and the written approval of the Attorney General.

This application was made to the Hon. Lloyd F. MacMahon, who, after considering the application, found that the United States Attorney had complied with the provisions of Title 18, United States Code, Section 1406, and was entitled to have the Court instruct the witness to testify and produce evidence before the grand jury.

Judge MacMahon explained to Andimo Pappadio, the witness, that full and absolute immunity from federal and state prosecution would be granted to him with respect to all matters concerning which he might be compelled to testify.

6. All steps were properly taken under the provisions of Title 18, United States Code, Section 1406, so that when Judge MacMahon ordered Pappadio to answer the questions Pappadio was then absolutely immune from prosecution, and was not subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might testify.

7. On August 4, 1964, Pappadio returned to the grand jury, but then and there refused to answer the questions.

8. On October 6, 1964, Andimo Pappadio again appeared before the same grand jury and refused to answer the questions.

9. On October 8, 1964, Andimo Pappadio was brought before me for an additional instruction. In the presence of Pappadio's attorney I again explained the immunity provisions of Title 18, United States Code, Section 1406. I again informed Pappadio that he had full and complete immunity as to any testimony which he gave before the grand jury, and then instructed Pappadio to return to the grand jury and give testimony.

10. On October 9, 1964, Pappadio appeared before the same grand jury. On this occasion Pappadio answered certain questions but refused to answer other questions on the basis of the First, Fifth and Sixth Amendments.

11. On October 13, 1964, Pappadio returned before the same grand jury. At this time he refused to answer the same questions which he had refused to answer on October 9, 1964.

Thereafter Pappadio was brought before me, and after hearing argument by his attorney, I ordered Pappadio to

return to the grand jury and answer the questions which he had previously refused to answer.

That same afternoon Pappadio appeared before the grand jury and wilfully refused to answer the questions as directed by me.

12. Among the questions that the witness so refused to answer were the following questions which are the predicate of the present contempt proceeding:

"Q. Mr. Pappadio, who are the attorneys who were present at these meetings?

"A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

"Q. Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

"A. I decline to answer under the First, the Fifth and the Sixth Amendment.

"Q. Who else was present at these meetings besides yourself, Lucchese and the attorneys?

"A. I respectfully decline to answer under the First, Fifth and Sixth Amendment.

* * *

"Q. All right; how many of such meetings were there?

"A. I respectfully decline to answer on the ground of the First the Fifth and Sixth Amendment.

* * *

"Q. Where did the meetings take place?

"A. I respectfully decline under the First, the Fifth and the Sixth Amendment."

The aforesaid questions which Pappadio refused to answer on October 13, 1964, were material and pertinent to the grand jury investigation then being conducted. Pappadio's refusal to answer these questions obstructed and hindered the grand jury in its investigation.

13. During the hearing conducted before me on October 28 and October 30, 1964, the United States submitted evidence and full opportunity was given to the witness, Andimo Pappadio, to present evidence. During this hearing Pappadio was at all times represented by counsel.

14. The Court finds that the witness is guilty of a criminal contempt as charged.

Conclusions of law:

1. The Court concludes that the witness is guilty of a criminal contempt as charged.

2. Andimo Pappadio is adjudged guilty of criminal contempt for his wilful disobedience on October 13, 1964, of a lawful order of the Court. Andimo Pappadio, in refusing to answer questions before the grand jury on October 13, 1964, wilfully violated the order of Judge MacMahon of August 4, 1964, and my order of October 13, 1964.

3. The Court hereby fixes the punishment as two years. An order to that effect shall be entered forthwith in accordance with Rule 42(b) of the Federal Rules of Criminal Procedure.

The foregoing portion of my decision consists of numbered findings and conclusions. I should now like to discuss some of the points. This portion of my decision represents an expression of opinion with regard to only a few of the points. Those points that I regard as transparently without merit will not be discussed or adverted to.

It is incorrect to argue, as the witness now does, that the burden of proof would be upon him to show the affirmative fact that the Government has used or is using his testimony in a prosecution, including the prosecution of a now pending indictment against the witness. Should the Government try the witness under the pending indictment, the burden would be on the Government to prove, clearly and convincingly, that all of its proof is derived from sources

completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony.

The burden would be upon the Government to establish the negative fact that none of its evidence is the fruit of the protected tree of the witness's immunized testimony. Such is the teaching of the cases on this point and in analogous situations. Murphy v. Waterfront Comm'n, 378 U. S. 52, 103 (1964) (concurring opinion of Mr. Justice White); Lapides v. United States, 215 F. 2d 253, 261 n. 10 (2d Cir. 1954) (dissenting opinion) (no disagreement as to this point); cf. United States v. Tane, 329 F. 2d 848, 853 (2d Cir. 1954); United States v. Agueci, 310 F. 2d 817, 834 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963); United States v. Paroutian, 299 F. 2d 486, 489 (2d Cir. 1962); United States v. Coplon, 185 F. 2d 629, 636 (2d Cir. 1950), cert. denied, 342 U. S. 920 (1952).

The memorandum submitted in behalf of the witness in opposition to the order to show cause does not discuss a single question involved herein. Instead, it is a generalized argument that side-steps the specific matters posed.

Under Title 18 U. S. C. Section 1406, the immunity statute, the Government has the right to obtain truthful testimony from the witness. That is the objective of the provision that excludes the witness's perjury, if any, from the immunizing effect of the statute.

The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the Government obtains the truth in exchange for its granting immunity.

That is the purpose of the concluding provisions in Section 1406, which read:

> "But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evi-

dence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

Virtually all immunity statutes contain the same or similar provisions with regard to perjury that may be committed by a witness.

The argument advanced in behalf of the witness with regard to a possible perjury prosecution, if accepted, would completely frustrate and nullify the purpose underlying the perjury provision contained in Section 1406 to which I have just alluded.

An order shall be entered in accordance with the directions of the Court hereinabove set forth. So ordered.

• • •

APPENDIX B.

Judgment of United States Court of Appeals Sought to Be Reviewed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of May one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDIMO PAPPADIO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

A true copy,

A. DANIEL FUSARO,
Clerk.

(Seal)

APPENDIX C.

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ANDIMO PAPPADIO,
Appellant.

Petition for Rehearing and Motion to Stay Issuance of Mandate Pending Application for a Writ of Certiorari to the Supreme Court of the United States.

LAURITANO, SCHLACTER & SCHNEIDER,
New York, N. Y., for appellant.

The motion for rehearing is denied.

The motion to stay our mandate is granted, subject to the conditions of our Rule 28(c).

J. E. L.,
H. R. M.,
T. M.,
U. S. C. JJ.

June 21, 1965

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

ANDIMO PAPPADIO,
Appellant.

Petition for Rehearing In Banc.

LAURITANO, SCHLACTER & SCHNEIDER,
New York, N. Y., for appellant.

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U. S. C. § 43 votes to deny, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

June 21, 1965